

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING
EN BANC**

No. 77-6130

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES POSTAL SERVICE,

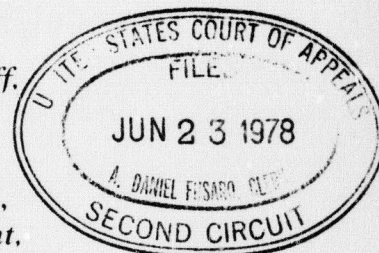
Plaintiff.

and

NATIONAL ASSOCIATION OF LETTER CARRIERS,
Plaintiff-Intervenor-Appellant.

v.

PATRICIA H. BRENNAN, J. PAUL BRENNAN
d/b/a P.H. BRENNAN HAND DELIVERY,
Defendants-Appellees.

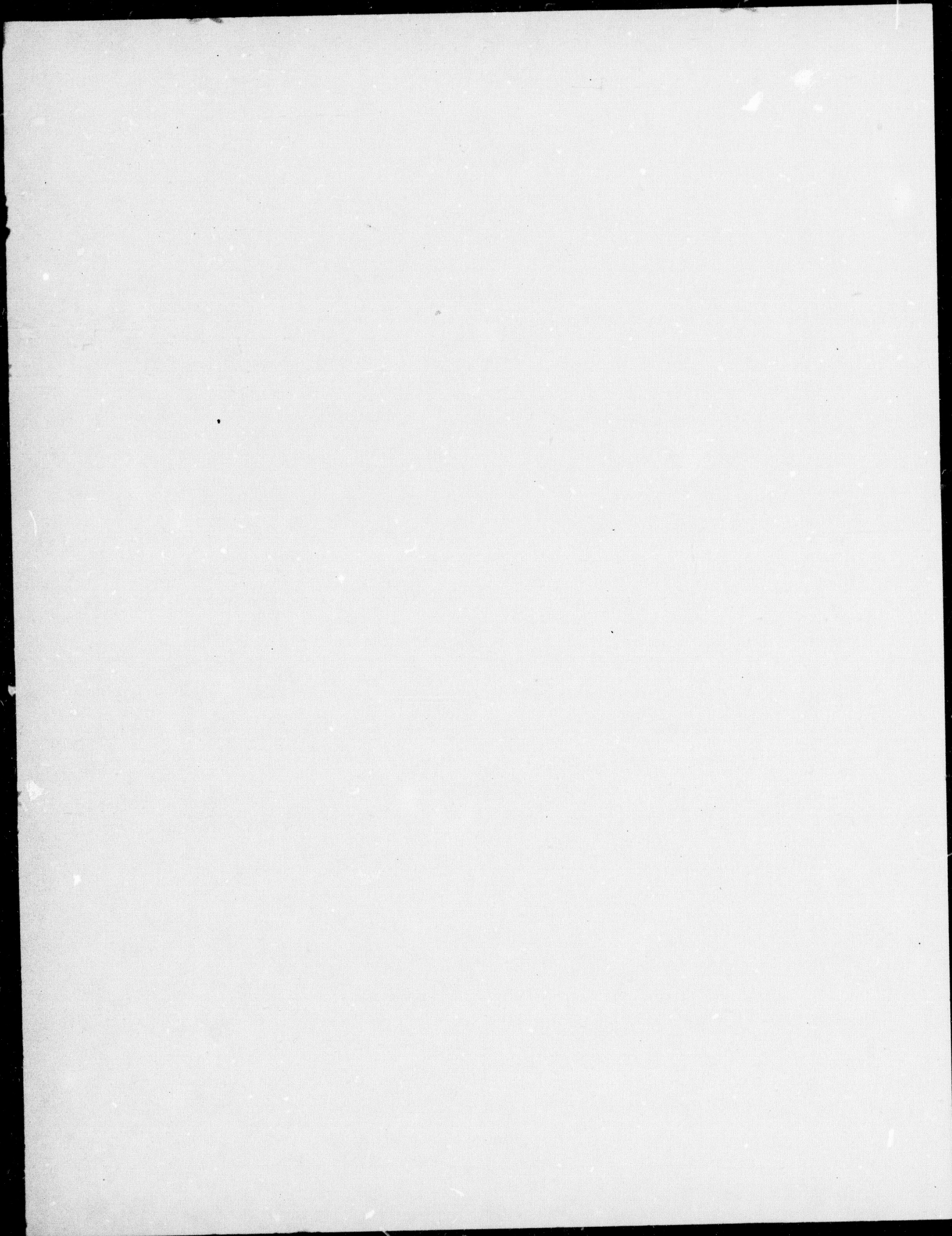


On Appeal From An Order of
The United States District Court for
The Western District of New York

**PETITION OF THE
NATIONAL ASSOCIATION OF LETTER CARRIERS
FOR REHEARING, AND SUGGESTION
FOR REHEARING EN BANC**

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 77-6130

UNITED STATES POSTAL SERVICE,

Plaintiff,

and

NATIONAL ASSOCIATION OF LETTER CARRIERS,

Plaintiff-Intervenor-Appellees,

v.

PATRICIA H. BRENNAN, J. PAUL BRENNAN
d/b/a P. H. BRENNAN HAND DELIVERY,

Defendants-Appellees.

On Appeal From An Order of
The United States District Court for
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PETITION OF THE
NATIONAL ASSOCIATION OF LETTER
CARRIERS AS INTERVENOR-APPELLANT FOR
REHEARING AND SUGGESTION FOR REHEARING EN BANC

The National Association of Letter Carriers (herein "NALC")
respectfully petitions this Court for rehearing and suggests
rehearing en banc of the decision of a panel of this Court^{1/}

1/ Circuit Judge Van Graafeiland and United States District Judge
Bartels for the majority; Circuit Judge Oakes dissenting.

entered June 7, 1978, affirming the denial to NALC of intervention as of right^{2/} for want of proof of inadequacy of representation.

NALC submits that rehearing en banc is warranted because the panel majority's decision misconceives and isapplies the inadequacy of representation test; conflicts with precedent in this Circuit; and reflects an equal division of sitting Circuit Judges.

In holding that where an applicant for intervention has the same "ultimate objective as a party to the existing suit", the applicant must overcome a "presumption of adequate representation" (slip op. 3354), the panel majority stands Trbovich v. United Mine Workers, 404 U.S. 528 (1972), precisely on its head. There the applicant was held entitled to intervene because, and only to the extent that, not only its object, but its "claims of illegality" were identical with those of the party putatively representing its interests (404 U.S. at 536-537). The Court held that even where the putative representative is charged by statute with serving as "[the applicant's] lawyer," and "[e]ven if the [representative] is performing his duties, broadly conceived, as well as can be expected," if the putative representative is a Government agency which is also charged with protecting a "vital

2/ The District Court (Hon. Harold P. Burke, D.J.), had denied Intervention for lack of standing. On this point, the panel unanimously reversed, slip op., p. 3353. As Judge Oakes pointed out, since the Brennans attack the validity of statutes "from which [NALC's] members benefit," (New York Pub. I.R.G. Inc. v. Regents of Univ. of N.Y., 516 F.2d 350, 352 (2 Cir., 1975)), NALC's "significantly protectable interest" in the litigation is "undeniable". Slip op. 3357.

public interest * * * that transcends the narrower interest [of the applicant for intervention]," there is "sufficient doubt about the adequacy of representation to warrant intervention" (404 U.S. at 538-539). The Court reasoned that inasmuch as the agency's "distinct interests, which are related, but not identical * * *" (404 U.S. at 538), "may not always dictate precisely the same approach to the conduct of the litigation" (404 U.S. at 539), as an approach reflecting only "the narrower interest" of the private applicant for intervention (id.), the applicant "may have a valid complaint about the performance of 'his lawyer'" (id.). The Court thus held that lack of complete identity of interest alone suffices to establish possible inadequacy of representation. Where complete identity of viewpoint is lacking, an applicant with "sufficient interest in the proceeding" (404 U.S. at 538, 539), must be allowed to intervene "to present evidence and argument in support of the [putative representative's] complaint" (404 U.S. at 537-538, 539).

Trbovich leaves no room for a "presumption of adequate representation" in this case. Here the putative representative is the United States Attorney (slip op. 3554), who represents only the broad public interest and the interest of Postal Service management and (unlike the Secretary of Labor in Trbovich) does not even purport to represent the rights and economic interests of the NALC and its membership. Slip op. 3359 (Oakes J., dissenting). If inadequacy of representation is established by lack of complete

identity of interest despite a common ultimate objective where the putative representative is, by statute, the would-be intervenor's lawyer, a fortiori it is by that token established where the allied party is not.

Here, as in Trbovich and New York Pub. I.R.G., Inc. v. Regents of Univ. of St. of N.Y., 516 F.2d 350, 352 (2 Cir., 1975), not only was NALC likely to "make a more vigorous presentation of the economic side of the argument" than the Government, the Government was unlikely to argue the "economic rights of union members" at all (slip op. p. 3359). Nor was the Government likely to seek vigorously to avert the irreparable adverse impact of the Brennan's unlawful competition upon the work and income of NALC's downtown Rochester letter carrier members, as NALC sought to do by its request for a preliminary injunction. Contrary to the majority opinion (slip op. 3354), the test is not whether the Postal Service has "as direct a legal and economic interest in the constitutionality of its monopoly as did NALC," but whether its interests and NALC's interests are in all relevant respects exactly the same. To that question there can be only one answer.^{3/} Furthermore, in the present case, as in New York Pub. etc., supra, and in contrast to Trbovich, the Government supported NALC's motion to intervene (A.48), acknowledging that NALC "should have

3/ Cases like Ordnance Container Corp. v. Sperry Rand Corp., 478 F.2d 844, 845 (5 Cir., 1972), and Commonwealth of Virginia v. Westinghouse Electric Corp., 542 F.2d 214, 216 (4 Cir., 1976), relied on in the majority opinion (p. 3354), are not in point because there the interests of the aligned party and the applicant for intervention are deemed to be not merely overlapping but identical, i.e., to "dictate precisely the same approach to the conduct of the litigation." Trbovich, supra, 404 U.S. at 538, 539.

an opportunity to make their own arguments to protect their own interests * * *. ^{4/} (516 F.2d at 352). Slip op. 3357, 3359 and n.3, 3359.

Indeed, the majority decision is not only in conflict with Trbovich and New York Pub. I.R.G., it is also in conflict in principle with the unanimous action of another panel of this Court in United States Postal Service v. Brennan, cited slip op., n. 1, p. 3353, which permitted NALC to participate as amicus in the briefing and argument of that appeal. If NALC had sufficient interest and potentially valuable contribution to the argument to warrant its participation as amicus, it was "entitled to insist upon intervention" (New York Pub., etc., 516 F.2d 352, n. 3, second sentence). Only intervention can assure the applicant rights of notice, service, petitioning for rehearing and certiorari, and policing the decree to insure compliance, which are essential to protect its interest. ^{5/}

^{4/} "A." references are to the parties' joint appendix on appeal. There, the United States Attorney's letter to the district court urging that NALC's intervention be granted, states:

"The U.S. Postal Service does not wish to submit a brief in connection with the motion to intervene. However, the U.S. Postal Service does support the position of the National Association of Letter Carriers. They should be allowed to intervene in this action."

We submit that this implicit recognition of the need on NALC's part to present its own arguments is itself sufficient to establish possible inadequacy of representation in light of Trbovich and New York Pub. I.R.G.

^{5/} In this latter regard, see United States v. Simmonds Precisions Products, Inc., 319 F.Supp. 620 (S.D.N.Y. 1970) where a union was held to have the right to intervene, under rule 24(a)(2), in an anti-trust action brought by the government against the defendant corporation which involved that corporation's acquisition of a competitor whose employees were represented by the union. The union sought and was granted intervention after a consent decree was reached to protect the job security of employees at the acquired firm.

That "[t]he issue before the District Court was strictly one of law" (slip op. 3354) does not distinguish the intervention precedents. Trbovich squarely holds that one of the purposes of intervention is to enable the applicant "to present * * * argument" to the District Court. 404 U.S. at 537. It flouts Trbovich to assume, as the majority does (slip op. 3354), that the Government will "advance all of the appropriate legal arguments in favor of constitutionality," or that it will advance them in the same manner and with the same emphasis, style and focus as would the applicant for intervention. It has been said that in law, as in music, the emphasis often makes the song. Cf. Frank, Words and Music: Some Remarks on Statutory Interpretation, 47 Col. L. Rev. 1259, 1264 (1947). That is why the Brennan panel entertained NALC's participation as amicus curiae.

Finally, for the reasons stated by Judge Oakes, slip op. 3354, n. 3, and accompanying text, the majority's discounting of the actual conflict of trial strategies in this case is neither relevant nor supportable. "NALC's complaint in intervention requested preliminary injunctive relief, a request not made by the Postal Service in its complaint." (Slip op. 3354.) Defendants-appellees opposed intervention in the court below on the ground, among others, that it would be highly prejudicial to their interest to confront them with a threat of preliminary injunctive relief which the Government had decided not to present. In this context at least, it is untenable to equate preliminary injunctive

relief with permanent injunctive relief. Thus, not only is NALC's quest for preliminary injunctive relief reflective of its differing approach to the conduct of the litigation, but it bears repeating that the sole line of relevant inquiry by this Court must focus upon this differing nature of the interests sought to be protected by NALC -- not on NALC's prospects for success in safeguarding the economic rights of its members.

In any event, the majority assumes that NALC's motion for preliminary injunctive relief would have failed because irreparable injury was de minimis, but that speculative conclusion derives from distributing the assumed loss of income resulting from "Brennan's small operation" among NALC's gross nationwide membership of "200,000" (slip op. 3355), rather than among the few downtown Rochester letter carriers who alone were adversely affected by that operation. NALC was foreclosed from presenting evidence as to the true equation, but the irreparability of the injury suffered by those letter carriers who were adversely affected seems self-evident. Mail once delivered is not redelivered. Moreover, bare "argument" unsupported by evidence in opposition to a stay motion is not a substitute for an evidentiary hearing followed by argument on a motion for preliminary injunction. NALC's motion to intervene and request for preliminary injunction were filed on April 13, 1977; the Government's motion for summary judgment was not filed until June 15, 1977. Had intervention been granted, NALC's motion for preliminary injunction could, should, and no doubt would, have been heard and decided months before the district court ruled on the Postal Service's motion for summary judgment on December 28, 1977.

CONCLUSION

The majority's decision reflects antipathy to intervention by applicants whose economic interests at stake are not identical with those of the party who is their imputed representative. That antipathy is incompatible with the hospitality reflected in Trbovich and New York Pub. I.R.G. To clarify the law in this Circuit for the benefit of public, bench and bar alike, this petition should be granted.

Respectfully submitted,

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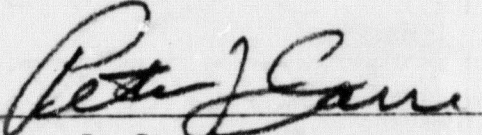
June 21, 1978

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petition Of The National Association of Letter Carriers As Intervenor-Appellant For Rehearing and Suggestion for Rehearing En Banc were sent by first class mail, postage prepaid, this 21st day of June, 1978, to:

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